

Exemptions 1 and 2

*Exemption 1:
Protecting National Security*

*Exemption 2:
Internal Rules and Practices*

Exemption 1

Protecting National Security

5 U.S.C. § 552(b)(1)

- *This section does not apply to matters that are--*
- *(1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and*
- *(B) are in fact properly classified pursuant to such Executive order;*

Exemption 1

- *Request comes in: give us this, that and the other thing*
- *We do our searches and find material that appears to be classified*
- *Does it fall under the Executive Order?*

EO 13526

- *EO signed by President Obama*
- *Revokes EO 12,958 (Clinton)*
- *Revokes EO 13,232 (Bush)*
- *Effective 180 days from December 29, 2009, except for sections 1.7, 3.3, and 3.7, which are effective immediately.*
- *Between now and June 29, 2010, EO 13,232 in effect*

EO 13256 Section 1.1

- *Classification standards. (a) Information may be originally classified under the terms of this order only if all of the following conditions are met:*

EO 13256 Section 1.1

(cont.)

- *(1) an original classification authority is classifying the information;*
- *(2) the information is owned by, produced by or for, or is under the control of the United States Government;*
- *(3) the information falls within one or more of the categories of information listed in section 1.4 of this order; and*

EO 13256 Section 1.1 (cont.)

- (4) *the original classification authority determines that the unauthorized disclosure of the information reasonably could be expected to result in damage to the national security, which includes defense against transnational terrorism, and the original classification authority is able to identify or describe the damage.*

EO 13256 Section 1.2

- *Three levels of classification: Top Secret, Secret, and Confidential*
- *Pertain to the degree of damage that will result from an unauthorized disclosure of the information*
- *Procedural Criteria: For a document to be properly classified, someone with original classification authority has to mark it at the appropriate level*

EO 13256 Section 1.2

- *Top Secret is defined as information that would cause "exceptionally grave damage" to national security if disclosed to the public*
- *Secret is defined as information that if released would cause "serious damage" to national security*
- *Confidential means information which would "damage" national security if disclosed*
- *"For Official Use Only" (FOUO)/SBU/LES does not mean that a document is classified*

EO 13256 Section 1.3

- *Who can classify material?*
- *Agency heads or designees*
- *Delegations are limited*
- *Any delegation must be in writing*

Section 1.4 Classification Categories

- *Information shall not be considered for classification unless its unauthorized disclosure could reasonably be expected to cause identifiable or describable damage to the national security in accordance with section 1.2 of this order, and it pertains to one or more of the following:*

Section 1.4 Classification Categories

- *(a) military plans, weapons systems, or operations;*
- *(b) foreign government information;*
- *(c) intelligence activities (including covert action), intelligence sources or methods, or cryptology;*
- *(d) foreign relations or foreign activities of the United States, including confidential sources;*

Section 1.4 Classification Categories

- *(e) scientific, technological, or economic matters relating to the national security;*
- *(f) United States Government programs for safeguarding nuclear materials or facilities;*
- *(g) vulnerabilities or capabilities of systems, installations, infrastructures, projects, plans, or protection services relating to the national security; or*
- *(h) the development, production, or use of weapons of mass destruction.*

Material is Properly Marked

- *Line by line review to answer this question:*
- *Is the material presently and properly classified?*
- *Whose opinion matters?-Original Classifying Authority*
- *Deference to agency expertise*

Material is Not Properly Marked

- *Documents are not marked, but contain classified information-what now???*
- *Can be classified after a FOIA request but only by the Agency head or certain designees*

Material is Not Properly Marked Section 1.7

- *(d) Information that has not previously been disclosed to the public under proper authority may be classified or reclassified after an agency has received request for it under the FOIA only if such classification meets the requirements of this order and is accomplished on a document-by-document basis with the personal participation or under the direction of the agency head, the deputy agency head, or the senior agency official designated under section 5.4 of this order.*

Sec. 1.7. Classification Prohibitions and Limitations

- *(a) In no case shall information be classified, continue to be maintained as classified, or fail to be declassified in order to:
(1) conceal violations of law, inefficiency, or administrative error;*
- *(2) prevent embarrassment to a person, organization, or agency;*
- *(3) restrain competition; or*
- *(4) prevent or delay the release of information that does not require protection in the interest of the national security.*

Other provisions in new EO that are now in effect

- *Sec. 3.3 Automatic Declassification*
- *Sec 3.7 Establishment of a National Declassification Center to coordinate and streamline the declassification process*

Other changes from EO 13526

- *No information may remain classified indefinitely (1.5d)*
- *Elimination of an intelligence community veto of declassification decisions made by the Interagency Security Classification Appeals Panel.*

Other changes from EO 13526

- *All executive branch agencies that classify info will be required to perform a comprehensive review of its internal classification guidelines to validate them and to identify classified information that no longer requires protection and can be declassified. (1.9)*
- *Sections 1.8c and 3.5g exclude material submitted for prepublication review from classification challenges and mandatory declassification review.*

Other b (1) Issues

- *GLOMAR*
- *Mosaic/Compilation*
- *Derivative classification*
- *Waiver*
- *Non-attribution*
- *Referrals/consultations*

GLOMAR

- *Glomar Response:*
- *Provides for an agency to refuse to confirm or deny the existence or nonexistence of requested information whenever its existence or nonexistence is itself classified*
- *Agency can neither confirm nor deny whether such records exist*
- *Example-all records held by criminal investigative organizations about me*

Mosaic/Compilation Theory

- *Classification based on mosaic/compilation theory*
- *Applies when a government agency compiles selected unclassified information into a single record or portion of a record that in its totality, is classified*
- *EXAMPLE: a listing of titles by date or control number of all intelligence studies done for a particular period of time*

Derivative Classification

- *Many people have it BUT for FOIA analysis purposes must go back to the OCA for assessment*

Waiver

- *“It was released-I saw it on the internet!”*
- *Release must be officially disclosed by proper authority*
- *Requester has burden of showing that the specific information requested matches information officially released*

Other Classification Issues

- *Non-attribution*
- *Referrals/consultations*

Exemption 2

Internal Rules and Practices

Exemption 2

- *5 U.S.C. § 552(b)(2) protects records that are “related solely to the internal personnel rules and practices of an agency”*
- *Two aspects to Exemption 2:*
 - *“Low 2” and “High 2”*

Exemption 2

- *Low 2-trivial matters*
- *High 2-substantive matters*

Exemption 2

- *“Low 2” covers trivial information of no public interest, such as awards, travel expenses, parking facility rules, file numbers, data processing notations, phone numbers*
- *No harm from release*
- *Little or no public interest in info*

Exemption 2

- *“High 2” covers more substantive information, such as operating rules and guidelines; manuals for investigators, auditors and examiners; computer security plans; examination questions and answers; homeland security-related information*
- *Disclosure would interfere with operations or risk circumvention of the law*

Exemption 2

- *Threshold Requirements:*

- *Information must be predominantly internal in nature--this means that the information is not widely disseminated*
- *Information relates to personnel rules and practices of an agency*
- *Courts willing to stretch this threshold when dealing with law enforcement material*

High 2

- *Computer codes*
- *Testing material*
- *Applicant evaluation criteria*
- *Law enforcement practices*
- *Restraint info at GTMO*